PP

v.

AZAHARI ABDUL WAHAB

HIGH COURT MALAYA, KANGAR
ZAMANI RAHIM JC
[CRIMINAL APPEAL NO: 41-04-2009]
16 JULY 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 15(1)(a) - Offence of consuming a dangerous drug - Accused's urine tested positive for Amphetamine - Accused presumed, until contrary proved, to have consumed drug - Dangerous Drugs Act 1952, s. 37(k) - Whether presumption activated*

CRIMINAL PROCEDURE: *Report - Institute for Medical Research's report - Whether admissible - Prosecution did not serve copy of report on accused - Non-compliance with Criminal Procedure Code, s. 399 - Defence never objected to admission of report - Whether report was wrongly admitted and illegal - Whether could be cured under Criminal Procedure Code, s. 422*

CRIMINAL PROCEDURE: *Exhibits - Bottle which contained accused's urine sample not produced as exhibit - No explanation from prosecution - Urine in bottle which contained Amphetamine was subject matter of charge - Whether failure to produce bottle fatal to prosecution's case*

On 31 January 2008 at about 4.05pm, acting on information received, a police party led by Insp. Lali bin Mohd Tamin, SP1 arrested the accused at the Emergency Department, Hospital Tengku Fauziah, Kangar, on suspicion that he was a drug addict. The accused's body was searched and nothing incriminating was found. The accused was taken to SP1's office where SP1 carried out a primary screening of the accused's urine and it was positive for Methamphetamine. As a result, SP1 lodged a police report *vide* Kangar Report No. 686/08, P1. Thereafter, SP1 handed over the accused, a sealed bottle of the accused's urine specimen and the police report, P1 to Insp. Nurul Isma binti Khairuddin, SP2, the investigating officer. Upon receipt of the bottle containing the accused's urine specimen, SP2 kept it in a refrigerator at Jabatan Siasatan Jenayah Narkotik (JSJN), Kangar. About five days later on 5 February 2008, SP2 handed over the said bottle together with a written request form to the Institute For Medical Research (IMR), Kuala Lumpur to have the accused's urine specimen screened or

examined for drugs. The said bottle was duly received by the IMR on the same day. On 15 February 2008, SP2 received the report of the examination of the accused's urine from the IMR, P4 which confirmed the accused's urine was positive for Amphetamine. However, SP2 did not receive back the said bottle. The accused was accordingly charged with the offence of consuming a dangerous drug, to wit, Amphetamine on 31 January 2008, at about 4.05pm at the Emergency Department at Hospital Tengku Fauziah Kangar, under s. 15(1)(a) of the Dangerous Drugs Act 1952 (the Act). The subject matter of the charge was Amphetamine detected in the accused's urine. By virtue of s. 37(k) of the Act, as the accused's urine tested positive for Amphetamine, he was presumed, until the contrary was proved, to have consumed the drug or to have administered the drug to himself. Before the above presumption was invoked, there must however be admissible evidence that the accused's urine specimen contained Amphetamine. Pursuant to s. 399(1) of the Criminal Procedure Code ("CPC") any report purporting to be made by officers of the Institute for Medical Research may be given in the trial, provided that the prosecution had served a copy thereof to the accused not less than 10 clear days before the commencement of the trial. At the trial, the prosecution called two witnesses and closed its case. At the end of the prosecution's case, the learned magistrate acquitted and discharged the accused on the ground that the bottle which contained the accused's urine sample, after having been examined and analysed by the IMR, Kuala Lumpur, was not produced as an exhibit. Dissatisfied with the magistrate's decision, the prosecution appealed to the High Court.

Held (dismissing the prosecution's appeal):

(1) After thoroughly examining the appeal record, the court could not find anywhere to say that P4 was served on the accused ten clear days before the commencement of the trial pursuant to s. 399 CPC. There was no endorsement or acknowledgment made by the accused at the reverse of P4 indicating that a copy of P4 had been received or served on him. P4 was tendered through the investigating officer, SP2 and there was nothing in her evidence that she served or caused another officer to serve P4 on the accused. Thus, P4 was admitted without due compliance with the proviso to s. 399 CPC. The admission of P4 was wrongful and illegal. It could not be cured under s. 422 CPC. Therefore, there was no admissible evidence to show that the accused's urine contained a dangerous drug,

Amphetamine and accordingly the presumption under s. 37(k) remained inactivated. On this ground alone, the accused was entitled to an acquittal at the close of the prosecution's case. *PP v. Lim Chen Len* (foll); *Goh Beng Seng v. Dol Dollah* (foll); *Ooi Lean Chai v. PP* (foll).

(2) The learned magistrate however, grounded the accused's acquittal on the prosecution's failure to produce the bottle containing the urine sample, as an exhibit. In this case the accused's urine sample after analysis was not expected to be preserved but the bottle was. The bottle was to carry a label with the accused's particulars thereon. It was not produced. There was no explanation from the prosecution whether it was lost or destroyed by the IMR officer. The urine in the said bottle which contained Amphetamine was the subject matter of the charge. No photograph was produced showing the said bottle with the accused's particulars on it. Another disturbing feature was when SP1 carried out the preliminary screening, the accused's urine was positive for Methamphetamine whilst P4 stated that it was positive for Amphetamine. The difference between Amphetamine and Methamphetamine was not satisfactorily explained. Tracing back the movement of the said bottle, it was kept in the refrigerator at SP2's office at JSJN, Kangar for 5 days before SP2 sent it to IMR, Kuala Lumpur on 5 February 2008. This gave rise to doubt whether the urine tested and analysed by IMR was the same urine taken by SP1 from the accused. On the facts and circumstances of this case, the failure to produce the said bottle was fatal to the prosecution's case. On this ground too, the accused was rightly acquitted and discharged by the learned magistrate at the close of the prosecution case. The prosecution's appeal is accordingly dismissed. *Gunalan Ramachandran & Ors v. PP* (dist).

Case(s) referred to:
Goh Beng Seng v. Dol Dollah [1969] 1 LNS 46 HC ***(foll)***
Gunalan Ramachandran & Ors v. PP [2004] 4 CLJ 551 CA ***(dist)***
Ooi Lean Chai v. PP [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 SC ***(foll)***
PP v. Lim Chen Len [1981] 1 LNS 11 ***(foll)***

Legislation referred to:
Criminal Procedure Code, s. 399(1), 422
Dangerous Drugs Act 1952, ss. 15(1)(a), 37(k)
Evidence Act 1950, s. 114(g)

For the appellant - Norhayati Ibrahim DPP
For the respondent - In person

Reported by Susheila Sreedharan

A

JUDGMENT

Zamani Rahim JC:

Grounds Of Decision

B **[1]** The accused was charged with an offence of consuming a dangerous drug, to wit, Amphetamine on 31 January 2008, at about 4.05pm at an Emergency Department at Hospital Tengku Fauziah Kangar, under s. 15(1)(a) of the Dangerous Drugs Act 1952 and punishable under s. 15 of the same Act.

C **[2]** The prosecution called two witnesses and closed its case. On hearing the submission at the end of the prosecution case, the learned Magistrate acquitted and discharged the accused on the ground that the bottle which contained the accused urine sample, after having been examined and analysed by the IMR, Kuala
D Lumpur, was not produced as an exhibit.

[3] Dissatisfied with the decision of the learned Magistrate, the prosecution appealed to this court.

[4] This is a simple case. The facts are as follows. On
E 31 January 2008 at about 4.05pm, acting on information received, a police party led by Insp. Lali bin Mohd Tamin, SP1 arrested the accused at the Emergency Department, Hospital Tengku Fauziah, Kangar, suspected to be a drug addict. The accused body was searched and nothing incriminating was found.

F **[5]** The accused was taken to SP1's office at Police Contingent Headquarters, Perlis. There, SP1 had carried out a primary screening of the accused's urine and it was positive for Methamphetamine. As a result, SP1 lodged a police report *vide* Kangar Report No. 686/08,
G P1.

[6] Thereafter, SP1 handed over the accused, a sealed bottle of accused's urine specimen and the police report, P1 to Insp. Nurul Isma binti Khairuddin, SP2, the investigating officer. Upon receipt of the bottle containing the accused's urine specimen, SP2 kept it
H in a refrigerator at Jabatan Siasatan Jenayah Narkotik, Kangar.

[7] About five days later on 5 February 2008, SP2 handed over the said bottle together with a written request form to the Institute For Medical Research (IMR), Kuala Lumpur to have the accused's urine specimen screened or examined for drugs. The said bottle was
I duly received by the IMR on the same day.

[8] On 15 February 2008, SP2 received the report of the examination of the accused's urine from the IMR, P4 which confirmed the accused's urine was positive for Amphetamine. However, SP2 did not receive back the said bottle. The accused was accordingly charged with the offence as stated at the beginning of this judgment.

[9] The prosecution had listed seven grounds of appeal. They are as follows:

(a) Pihak YA Majistret telah terkhilaf apabila mendapati pihak pendakwaan telah gagal buktikan satu kes *prima facie* terhadap OKT sedangkan keterangan-keterangan yang ada membuktikan sebaliknya.

(b) Pihak YA Majistret telah terkhilaf apabila gagal untuk memanggil tertuduh untuk membela diri terhadap tuduhan tersebut.

(c) Pihak YA Majistret terkhilaf apabila memutuskan bahawa pihak pendakwaan telah gagal membuktikan kes pendakwaan kerana gagal mengemukakan botol urine yang mempunyai pelekat bertulis butir-butir diri responden.

(d) Pihak YA Majistret terkhilaf apabila memutuskan SP2 iaitu pegawai penyiasat telah gagal untuk mendapatkan botol urine tersebut.

(e) Pihak YA Majistret juga terkhilaf apabila memutuskan bahawa siasatan adalah tidak lengkap dan pegawai panyiasat tidak berusaha untuk mendapatkan kembali botol urine dan menimbulkan pelbagai keraguan dalam prosiding.

(f) YA Majistret juga khilaf apabila menggunakan s. 114(g) Akta Keterangan ia kerana kegagalan pihak pendakwaan untuk mengemukakan botol urine yang telah dihantar kepada pihak IMR untuk analisa.

(g) YA Majistret juga terkhilaf apabila memutuskan bahawa kegagalan pihak IMR untuk serahkan kembali botol urine adalah amalan atau praktis serta tidak mengikut undang-undang.

[10] Essentially it concerned the non-production of the bottle containing the accused's urine specimen after having been examined by the IMR.

[11] It is obvious in this case, the subject matter of the charge was Amphetamine detected in the accused's urine. And by virtue of s. 37(k) of the Act, as the accused urine was tested positive for Amphetamine, he is presumed, until the contrary is proved, to have consumed the drug or to have administered the drug to himself.

[12] Before the above presumption is invoked, there must be admissible evidence that the accused's urine specimen contained Amphetamine. And the learned deputy said the prosecution was relying on the IMR report, P4. P4 stated that the accused urine 30 ml was found to contain Amphetamine. The test conducted was by way of Gas Chromatography Mass Spectrometry.

[13] After going through the appeal record, I have some reservation about the admissibility of P4. Is P4 admissible in evidence? If P4 is inadmissible the prosecution case will definitely collapse at the first whiff of the defence breeze.

[14] As in the case of a chemist report, any report purporting to be made by officers of the Institute for Medical Research may be given in the trial, provided always the prosecution shall serve a copy thereof to the accused not less than 10 clear days before the commencement of the trial, s. 399(1) of the Criminal Procedure Code (CPC) provides:

> Any document purporting to be a report under the hand of any of the persons mentioned in subsection (2) of this section upon any person, matter or thing examined or analysed by him or any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any inquiry, trial or other proceeding under this Code unless such person or Registrar shall be required to attend as a witness:
>
> (a) by the court; or
>
> (b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial;
>
> Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial.
>
> (2) The following are persons to whom the provisions of this section apply:
>
> (a) officers of the Institute for Medical Research
>
> (b) ...
>
> (c) ...
>
> (d) ...

(e) ...

(f) ...

(3) The persons referred to in subsection (2) of this section and the Registrar of Criminals are by this Code bound to state the truth in reports made under their hands.

[15] In this case, after thoroughly examining the appeal record, I could not find anywhere to say that P4 was served on the accused ten clear days before the commencement of the trial pursuant to s. 399 CPC. It was completely silent. I have since called for the records of the magistrate's court in this case. I have viewed the original copy of P4 and found no endorsement or acknowledgment made by the accused at the reverse of P4 indicating that a copy of P4 had been received or served on him. I only discovered that P4 was tendered through the investigating officer SP2. No where in her evidence that she served or caused another officer to serve P4 on the accused.

[16] The relevant part of SP2's evidence are as follows:

Selepas hantar urine ke IMR, pada 15 Februari 2008 saya terima keputusan daripada IMR Kuala Lumpur berkenaan analisis urine dan dapati mengandungi Amphetamine. Saya boleh cam dengan laporan urine tersebut.

PO : Pohon rujuk laporan ujian air kencing.

Ya, betul ini ujian laporan air kencing yang diterima.

MH : SP2 camkan pada borang.

Laporan ini atas nama Azahari bin Abdul Wahab, OKT sekarang.

PO : Pohon untuk ditanda sebagai P.

MH : Keputusan ujian urine ... P4.

[at p. 17 of Appeal Record]

[17] Thus, P4 was admitted without due compliance with the proviso to s. 399 CPC. In *PP v. Lim Chen Len* [1981] 1 LNS 11; [1981] 2 MLJ 41, Mohamed Azmi J (as he then was) held at p. 42 as follows:

A In *Chong Yik v. PP*, Storr J held that in proviso to s. 399(i) of the Criminal Procedure Code is a condition precedent and, if not complied with, the report of the Government Chemist cannot be admitted. If it is wrongly admitted in evidence, that wrongly admitted in evidence, that wrongful admission is an illegality which cannot be cured under s. 422 of the Criminal Procedure Code. Similarly, in B *Wong Kok Keong v. R*, Spenser Wilkinson J in dealing with s. 427(1) of the Straits Settlement Criminal Procedure Code (Cap.21) which was in pari material with s. 399(i), held the view that the provisions related to evidence rather than to procedure.

C **[18]** On this issue, it is also pertinent to refer to the case of *Goh Beng Seng v. Dol Dollah* [1969] 1 LNS 46; [1970] 2 MLJ 95 where his Lordship Sharma J at p. 97 said:

D The mere fact, however, that counsel for the defendant in this case did not object to the admissibility of the statements of witnesses made to the police, does not excuse me from excluding such evidence if in fact and law it is not admissible. It is the duty of the court to disallow all inadmissible evidence even though no objection is taken to its admissibility. Inadmissible evidence remains inadmissible. It cannot be rendered admissible by failure of counsel to object to it.

E **[19]** When I continued to interject on the admissibility of P4, the learned deputy never gave up and argued that the learned defence counsel had not raised any objection to the admission of P4 in evidence. On this, I only need to refer to the decision of the Supreme Court in *Ooi Lean Chai v. PP* [1991] 2 CLJ 1304; [1991] 1 CLJ (Rep) 337 where Mohamed Azmi SCJ said:

F We agreed that s. 399(i) CPC was not merely a procedural provision but it contained *inter alia* rules of admissibility of chemist report which dispensed with the need to call the Government chemist as maker of the document as witness. The learned counsel for the appellant also referred to the case of *Chah Siew Kok v. PP* [1987] CLJ (Rep) 518 G where Peh Swee Chin J held that if a chemist report was admitted in contravention of s. 399 of the Criminal Procedure Code, it would be an irregularity of a serious nature and the report in such circumstances was inadmissible evidence despite its admission. He also held that a waiver or an estoppel could not be raised against s. 399 which imposed a duty on the prosecution to call the chemist as a witness. Further a H waiver by an accused person could not be held against him in regard to rules of procedure and evidence in criminal proceedings. Any admission of inadmissible evidence even with consent or by waiver of the accused was wrongful and such inadmissible evidence remained inadmissible evidence, the effect of which was open to any court to assess. I

> In our view it is settled law that the proviso to s. 399(i) CPC is a condition precedent and if not complied with, the chemist report cannot be admitted in evidence without calling the Government chemist to produce it.

[20] At the end of the day, the admission of P4 was wrongful and illegal. It cannot be cured under s. 422 CPC. There is therefore, no admissible evidence to show that the accused's urine contained a dangerous drug, Amphetamine and accordingly the presumption under s. 37(k) remains inactivated. On this ground alone, the accused is entitled to an acquittal at the close of the prosecution case.

[21] The above ground is sufficient to dispose off the prosecution's appeal in this case. However, the learned magistrate grounded the accused's acquittal because of the prosecution's failure to produce the said bottle as the exhibit. He said at p. 26 of appeal record as follows:

> ... mahkamah berpendapat bahawa kegagalan untuk pihak pendakwaan mengemukakan botol urine yang mempunyai pelekat bertulis butir-butir peribadi responden adalah 'fatal' bagi kes pendakwaan.

The learned magistrate went on to say at p. 27 as follows:

> ... berdasarkan kepada isu botol tersebut, pihak pendakwaan mestilah mengemukakan sebagai membuktikan bahawa botol urine ini adalah sama dengan botol urine yang digunakan dan disimpan sampel urine tersebut. Pihak pendakwaan juga perlu membuktikan bahawa setiap butir-butir peribadi responden pada botol urine tersebut adalah sama dengan yang dihantar pada pihak IMR.

[22] The learned deputy disagreed with the learned magistrate's ground of acquittal, relying on the Court of Appeal case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551 where it was said at p. 551 as follows:

> The chain of evidence is less important during the period it is received back from the chemist until it is produced in court. This is because, there is no law that the exhibit recovered must be produced in court failing which the prosecution's case must necessarily fall. It may or it may not, again depending on the facts and the circumstances of each case. *Sunny Ang v. PP* [1966] 2 MLJ 195 (FC) (foll). In a drug trafficking case, the drug may be lost or destroyed subsequent to it having been analysed by the chemist. So long as there is no doubt that the drug analysed by the chemist is the same one that was recovered in the case and it is in respect of that drug that the accused is charged, and there is a reasonable explanation as to how it was lost or destroyed

A or the reason for the gap, there is no reason why the prosecution's case should fall. In the instant case, there was no break in the chain of evidence whatsoever, from the day it was seized until the date of trial. The missing exhibits did not contain any drugs. They were empty plastic packets and weighing machine. Their existence could be seen from the photographs, not to mention oral evidence.

B

[23] I would venture to say that failure to produce the said specimen bottle after the accused's urine had been tested and analysed by the IMR, may or may not be fatal to the prosecution's case depend on the facts and circumstances of each individual case. C The prosecution should not adopt an attitude that *Gunalan Ramachandran & Ors, supra* may provide an antidote to cure all cases of missing or non-production of exhibits after they have been examined or analysed by the expert.

[24] In this case, the accused's urine sample after analysis is not D expected to be preserved but its bottle is. The bottle was said to carry a label with the accused's particulars thereon. It was not produced. Was it lost or destroyed by the IMR officer?. There was no explanation forthcoming from the prosecution. It may be distinguished with the exhibits in *Gunalan Ramachandran & Ors, supra.* E There, the missing exhibits were empty plastic packets and a weighing machine. They were not the subject matter of the charge. Their existence could be seen from the photographs. In this case, the urine in the said bottle which contained Amphetamine was the subject matter of the charge. No photograph was produced showing F the said bottle with the accused's particulars on it. The prosecution was taken to task by the learned counsel regarding the non-production of the said bottle. The cross-examination on this issue ran as follows.

Q : Setuju dengan saya jika dituduh dibawah seksyen ini botol urine G jadi isu?

A : Setuju.

Q : Setuju jika OKT tidak puashati dengan laporan urine, OKT ada hak untuk bawa ahli kimia bebas?

H

A : Tidak setuju.

Q : OKT tidak ada hak untuk hantar ke ahli kimia?

A : Jika yang berdaftar boleh.

I [p. 18 of Appeal Record]

[25] Another disturbing feature or evidence is this. When SP1 carried out preliminary screening, the accused's urine was positive for Methamphetamine, whilst P4 stated that it was positive for Amphetamine. The learned counsel questioned SP2 on this difference and the reply was as follows:

> Q : Rujuk P1, hasil saringan dilakukan Insp. Lali, OKT didapati positive Methamphetamine, laporan urine di P4 Amphetamine, apa beza?
>
> A : Amphetamine dan Methamphetamine adalah jika ambil syabu selalunya timbul Amphetamine atau Methamphetamine.
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> [p. 19 of Appeal Record]

On this issue, the accused urine sample was taken by SP1. His evidence ran as follows.

> Saya boleh tahu positif Methamphetamine berdasarkan pada label ujian botol tersebut. Botol tersebut botol ujian saringan awal air kencing. Selepas dapati positif Methamphetamine saya buat laporan polis ke atas lelaki tersebut.
>
> [p. 11 of Appeal Record]

[26] The difference between Amphetamine and Methamphetamine was not satisfactorily explained. The competent person to explain is most probably the IMR officer who carried out the examination and analysis of the accused's urine sample. Tracing back the movement of the said bottle, it was kept in the refrigerator at the investigating officer's office at Jabatan Siasatan Jenayah Narkotik (JSJN), Kangar for five days before SP2 sent it to IMR, Kuala Lumpur on 5 February 2008. This gives rise to doubt whether the urine tested and analysed by IMR was the same urine taken by SP1 from the accused.

[27] On the facts and circumstances of this case, the failure to produce the said bottle is fatal to the prosecution case. On this ground too, the accused was rightly acquitted and discharged by the learned magistrate at the close of the prosecution case. The prosecution appeal is hereby dismissed.